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No. 96-320

IN THE

Supreme Court of the United States

October Term, 1996

METRO-NORTH COMMUTER RAILROAD,
Petitioner,

vs.

MICHAEL BUCKLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER'S PETITION FOR CERTIORARI

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**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE DEFENSE RESEARCH INSTITUTE
IN SUPPORT OF PETITIONER'S
PETITION FOR CERTIORARI**

Pursuant to Rule 37.4 of the Supreme Court Rules, the Defense Research Institute moves for leave to file the attached Brief of Amicus Curiae in support of Petitioner. Consent of the Petitioner, Metro-North Commuter Railroad Company, has been granted. Consent of the Respondents has been requested by letter to counsel for the Respondent but has been withheld. The Defense Research Institute ("DRI") is a national organization with its membership being lawyers involved in the defense of civil litigation. DRI is the nation's largest association of civil litigation defense lawyers, whose 20,000 members are primarily attorneys in private practice who defend corporations, associations, insurance companies, governmental bodies, and individuals in various courts, administrative actions, and other civil litigation.

To the best of our knowledge, no member of DRI has a direct, monetary interest as a party to this litigation. DRI members do have an interest in the legal principles addressed by this Brief as a friend of the Court because it presents issues of national importance. While facially the issues involved in the case may appear limited to a statutory scheme (FELA), the issue is of much broader significance. Not only does FELA jurisprudence rely upon and "glean guidance" from common law developments, and perhaps because of that reliance upon common law developments, FELA jurisprudence also affects common law developments.

While we are said to be a nation of laws, a nation governed by the rule of law, the common law of tort liability is and has been for the last 30 years, a boiling caldron. Nowhere is that phenomenon more evident than in the tort liability concept of negligent infliction of emotional distress. With every individual, every company, and every governmental entity in America potentially a defendant in a suit seeking damages for negligent infliction of emotional distress, an injury of which the defendant has precious little ability to test the validity, there is a strong need for minimum standards to place rational limits on that potential liability. The opinion of the Second Circuit in this case discards traditionally accepted common law requirements and essentially eliminates the ability of a defendant to test the validity of a claim for which it might be liable. Therefore, the DRI has a strong interest in this Court's recognition of minimum common law requirements to establish a cause of action for negligent infliction of emotional distress.

For the foregoing reasons, DRI respectfully submits that the attached Amicus Curiae Brief will not only aid this Court in the resolution of the questions raised by the opinions below, but may also help bring this Court's

attention to the importance and effect its decision will have upon the rational development of the common law.

DRI, therefore, moves this Court for leave to file the attached brief.

Respectfully submitted,

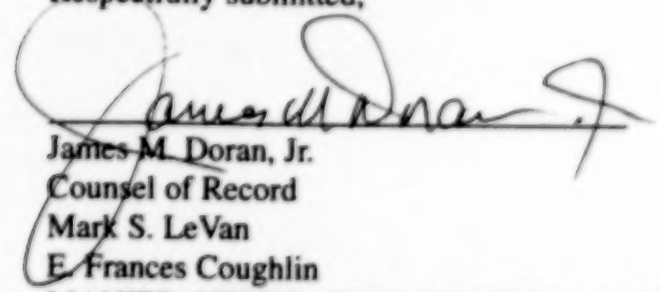

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

THIS COURT SHOULD ADHERE TO COMMON LAW MINIMUM STANDARDS FOR SCRUTINIZING EMOTIONAL INJURY CLAIMS 3

A. THERE SHOULD BE A REQUIREMENT OF SOME PHYSICAL MANIFESTATION OF THE DISTRESS 7

B. THE PLAINTIFF'S EMOTIONAL DISTRESS MUST BE SEVERE 8

C. THE PLAINTIFF MUST PROVIDE MEDICAL PROOF OF THE DISTRESS 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991) 5

Ball v. Joy Technologies, Inc., 755 F.Supp. 1344 (S.D.W.V.a. 1990) 6

Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981) 7

Burgess v. Superior Court, 2 Cal. 4th 1064, 831 P.2d 1197 (1992) 5, 8

Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996) 5, 8, 9

Consolidated Rail Corp. v. Gottshall, 114 S.Ct. 2396 (1994) 2, 3, 5, 9, 10

Corso v. Merrill, 119 N.H. 647 (1979) 7

Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980) 5

Dillon v. Legg, 441 P.2d 912 (1968) 4

Garrison v. Medical Ctr. of Delaware, 581 A. 2d 288 (Del. 1988) 5

Garvis v. Employers Mut. Casualty Co., 497 N.W.2d 254 (Minn. 1993) 5

Hammond v. Central Lane Communications Ctr., 312 Ore. 17, 816 P. 2d 593 (1991) 5

Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (Haw. 1974) 9

Ob-Gyn Assc's of Albany v. Littleton, 259 Ga. 663, 386 S.E. 2d 146 (1989) 5

Payton v. Abbott Labs., 386 Mass. 540 N.E.2d 171 (1981) 4, 7

Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983) 8, 9

Plaisance v. Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991) 8

R.J. v. Humana of Florida, Inc., 652 So. 2d 360 (Fla. 1995) 5

Rodrigues v. State, 472 P.2d 509 (Haw. 1960) 8

Shultz v. Barber Glass Co., 4th Ohio St.3d 131, 447 N.E.2d 109 (1983) 5

St. Elizabeth Hosp. V. Garrard, 730 S.W.2d 649 (Tx. 1987) 5, 8

Thing v. La Chusa, 48 Cal. 3d 644, 257 Cal. Rptr. 865 (1989) 4

Towns v. Anderson, 195 Colo. 517 (1978) 7

Vance v. Vance, 388 Md. 490 (1979) 7

Vicnire v. Ford Motor Co., 401 A.2d 148 (Me. 1979) 7

OTHER AUTHORITIES

J. Mark Appleberry, *Negligent Infliction of Emotional Distress: A Focus on Relationships*, 21 Am.J.L. &Med. 301 (1995) 3

Steven Fromm, *The Snowmen of Grand Central*, Conn. Law Tribune, Apr. 15, 1996 1

Nancy Levit, *Etherial Torts*, 61 Geo. Wash. L. Rev. 136 (1995) 7

Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases, U.of Chicago L. Rev. 512 (1968) 9

W. Prosser & W. Keeton, PROSSER AND KEETON ON THE LAW TORTS OF TORTS 54 (5th ed. 1984) 8

RESTATEMENT (SECOND) OF TORTS 436A (1965) 6, 7

John J. Ropiequet, *Emotional Distress Claims in Medical Malpractice Cases*, For the Defense, April 1990 4

Leslie Benton Sandor & Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss*, 37 Ariz. L. Rev. 1247, 1254 .....4, 7

INTEREST OF THE *AMICUS CURIAE*

The Defense Research Institute ("DRI") is an organization with members throughout the United States numbering in excess of 20,000. It seeks to advance the cause of the civil justice system in America by insuring that the concerns of the defense bar and potential defendants are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress on select legislation impacting the civil justice system. The Defense Research Institute provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

The Defense Research Institute is interested in the outcome of this case because of the potentially large number of claims it will affect. If this Court allows the lower court's decision to stand, the end result will be that future litigants will rely upon the Second Circuit's alarming decision to try to expand tort liability in other than just FELA cases, and the door to subjective claims of emotional distress will be thrown wide open.[1]

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[1] According to the Connecticut Law Tribune, the Second Circuit's ruling that "workers could sue the railroad for asbestos exposure—even though they may be years from falling ill" will have a tremendous effect on American tort law. Steven Fromm, *The Snowmen of Grand Central*, CONN. LAW TRIBUNE, Apr. 15, 1996, at 1. The article states, "Attorney's [sic] specializing in asbestos and product liability law in Connecticut and across the country assert that the ruling is a landmark decision that may open the door for asbestos exposure cases—and other product liability cases—throughout the country." *Id.* The article goes on to report that thousands of cases (totaling 35,000 to 40,000) involving members of the Merchant Marine who charge that they were exposed to asbestos during their service over the years have been consolidated in the U.S. District Court in Philadelphia. *Id.*

SUMMARY OF ARGUMENT

The Petitioner seeks certiorari from an opinion of the Second Circuit holding, in conflict with a decision of the Third Circuit, that a plaintiff who was exposed to asbestos but had no physical injury was entitled to damages for emotional distress and medical monitoring. Petitioner raises four questions for consideration. The provisions of the Federal Employers Liability Act and the statutory requirements for recovery under that Act are set forth persuasively in the Petition and will not be addressed here. Rather, this Brief will focus on the common law requirements for a purely emotional injury. It will address the importance of the common law requirements established to test the validity and extent of emotional injury claims: (a) physical manifestation; (b) seriousness; and (c) medical or scientific evidence.

While the zone of danger test adopted by this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S.Ct. 2396 (1994) addresses who may make a claim, the Second Circuit opinion demonstrates that the Court should go further and address the minimum requirements for the type of claims that are permitted.

ARGUMENT

THIS COURT SHOULD ADHERE TO COMMON LAW MINIMUM STANDARDS FOR SCRUTINIZING EMOTIONAL INJURY CLAIMS

The Second Circuit, in its application of the "zone of danger" test adopted by this Court in *Consolidated Rail Corp v. Gottshall,* 114 S.Ct. 2396 (1994), failed to impose any standards with which to test the validity of emotional injury claims. This Court should not allow the Second Circuit's decision to stand and should adhere to common law minimum standards for scrutinizing negligent infliction of emotional distress claims.

When this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S.Ct. 2396 (1994) adopted the "zone of danger" test, it noted several concerns stemming from emotional distress claims potentially creating "infinite liability" to an "infinite number of persons." *Id.* Any number of people may suffer emotional distress which "may occur far removed in time and space from the negligent conduct..." *Id.* at 441. It is more difficult to predict the existence and degree of mental injury. *Id.* In short, the *Gottshall* court's concerns were based on the difficulty in determining *who* suffers *compensable* mental suffering.

Based on these same concerns, "[t]he common law consistently has sought to place limits on this potential liability by restricting the class of plaintiffs *who* may recover and the *types* of harm for which plaintiffs may recover."[2] *Id.* at 2405 (emphasis added). Through its adoption of the "zone of danger" test, *Gottshall* followed the common law tradition by placing limitations on those who may recover, but the opinion of the Second Circuit in this case demonstrates that this Court should go further.

By narrowly defining who can bring a mental injury claim, the "zone of danger" test resolves the common law's and *Gottshall's* concerns over such claims creating an "unlimited number" of potential plaintiffs, but because the Court failed to define which mental injuries are compensable, the "zone

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[2] Although courts have begun to recognize claims for negligent infliction of emotional distress, "concerns over the possibility of a flood of litigation and the need to limit liability in proportion to the defendant's culpability led courts to develop threshold tests to determine the validity of claims for emotional distress." J. Mark Appleberry, *Negligent Infliction of Emotional Distress,* 21 AM.J.L.&MED. 301 (1995) (examining the current state of the law governing negligent infliction of emotional distress claims).

of danger" test was interpreted by the Second Circuit to allow a plaintiff to recover for any injury, no matter how trivial. *Buckley v. Metro-North Commuter Railroad,* 79 F.3d 1337 (2nd Cir. 1996) (holding that a plaintiff may recover for pure emotional injuries with no accompanying physical injury or objective proof of the mental injury). The "zone of danger" test dams the "veritable flood of litigation," but its failure to establish a standard for compensable mental distress creates substantial "cracks."

These "cracks" of potentially "unlimited liability" are caused by the difficulty in determining the existence and the extent of emotional distress. An individual may genuinely, but wrongly, believe that he or she suffers mental injury as a result of an act of negligence. *Payton v. Abbott Labs.,* 386 Mass. 540, 546, 437 N.E.2d 171, 175 (1981). Recognizing the ability of the human mind to play tricks upon itself, as easily as people are able to deceive one another, courts "continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered mental distress." *Id.* This Court should also continue to adhere to the common law and its traditional indicia of harm.

The common law has undergone significant upheaval in recent years with respect to claims for negligent infliction of emotional distress.[3] Many courts have abandoned the traditional tests of requiring "physical impact"[4]

[3] Legal scholars addressing the issue state, "the case law in the field [of negligent infliction of emotional distress] is in an almost unparalleled state of confusion." Leslie Benton Sandor & Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment,* 37 ARIZ. L. REV. 1247, 1249 (1995).

[4] According to John L. Ropiequet, "Due to judicial stretching of the physical impact or injury requirement, its practical effect in many jurisdictions is virtually meaningless." John L. Ropiequet, *Emotional Distress Claims in Medical Malpractice Cases,* FOR THE DEFENSE, April 1990 13, 13.

[5] The "foreseeability" approach or "relative bystander" test was first utilized by the California Supreme Court in *Dillon v. Legg,* 441 P.2d 912 (1968). After the Dillon ruling, the California courts began to experiment with the ruling and to expand liability. Finally, the California Supreme Court "put an abrupt halt to expansive readings of the *Dillon* rule in *Thing v. La Chusa,* 48 Cal. 3d 644, 257 Cal. Rptr. 865 (1989), ending 20 years of experiments and disagreement in the lower courts by returning to a literal reading of the elements set forth in *Dillon.*" John L. Ropiequet, *Emotional Distress Claims in Medical Malpractice Cases,* FOR THE DEFENSE, April 1990 13, 18. The *Thing* Court "drew what it admitted were arbitrary lines to limit liability and establish firm rules by changing *Dillon's* guidelines' into positive rules of law." *Id.* The significance of this reversion back towards a more conservative approach is that California retreated away from a liberal, expansive view of emotional tort liability. The California courts' search for concrete guidelines demonstrates the need for substantial certainty in the law of negligent infliction of emotional distress.

or that the plaintiff be in the "zone of danger." Some of the more liberal tests are known by a variety of names, such as "foreseeability"[5] and "general negligence."[6] Many different names and methods of limiting these claims exist, but the purpose remains the same.[7] However the test is formulated in a specific jurisdiction, the fundamental, overriding concern among the courts is that there must be some minimum standard for recovery of purely emotional distress claims where there is no physical injury. *See, e.g., R.J. v. Humana of Florida, Inc.,* 652 So. 2d 360 (Fla. 1995); *Hammond v. Central Lane Communications Ctr.,* 312 Ore. 17, 816 P. 2d 593 (1991); *Ob-Gyn Assc's of Albany v. Littleton,* 259 Ga. 663, 386 S.E. 2d 146 (1989); *Garrison v. Medical Ctr. of Delaware,* 581 A. 2d 288 (Del. 1988); *Deutsch v. Shein,* 597 S.W.2d 141, (Ky. 1980).

Because the more liberal tests create substantial "cracks" in the dam of the "veritable flood of litigation," most jurisdictions impose additional standards with respect to the types of emotional injury which may be compensated. Many that follow the "zone of danger" or "relative bystander" tests also require that a plaintiff demonstrate "physical manifestation" of an alleged emotional injury, that is, a physical injury or effect that is the direct result of an emotional injury, in order to recover. Gottshall, 114 S.Ct. At 2407, n. 11 (citing *Garvis v. Employers Mut. Casualty Co.,* 497 N.W.2d 254 (Minn. 1993)).

Other courts, including courts that have expanded to the "general negligence" approach, have recognized the requirements that the emotional injury be "serious" or "severe." *Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996); *Burgess v. Superior Court,* 2 Cal. 4th 1064, 831 P.2d at 1197, 1200 (1992); *Shultz v. Barber Glass Co.,* 4th Ohio St.3d 131, 447 N.E.2d at 109, 113 (1983) ("we hold that a cause of action may be stated for the negligent infliction of serious emotional disturbance without a contemporaneous injury"); *St. Elizabeth Hosp. v. Garrard,* 730 S.W.2d 649, 653 (Tx. 1987)

[6] The most recent jurisdiction to address this issue is the State of Tennessee. Upon surveying the law and addressing the significant policy concerns, the Tennessee Supreme Court recently adopted a "general negligence" approach towards these types of claims. *Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996).

[7] Courts have addressed the substantial public policy concerns stemming from these types of cases. For example, in *Ball v. Joy Technologies, Inc.,* 958 F.2d 36 (4th Cir. 1991), the Fourth Circuit affirmed the district court's grant of the defendant's motion for summary judgment, finding that the "plaintiffs had not sustained any physical injury from their exposure to toxic chemicals and having suffered no physical injury, the common law of West Virginia and Virginia would not allow them to recover damages for emotional distress or the costs of medical surveillance." Id. At 37. The district court emphasized the policy considerations behind its decision:

(stating that "freedom from severe emotional distress is an interest which the law should serve to protect.") The reason for these standards for compensable mental injury "is to guard against the litigation of trivial or fraudulent claims." *Burgess,* 831 P.2d at 1200 n. 6.

The Second Circuit's decision represents a relaxation of the traditional standards of tort liability and an expansion of liability for negligent infliction of emotional distress.[8] The Second Circuit analysis uses no minimum standards to test the genuineness of alleged negligent infliction of emotional distress claims. It is submitted that the Second Circuit's decision, if allowed to stand, will be relied upon by untold numbers of future litigants in FELA, Jones Act, products liability and other common law cases for its expansive holding and the dangerous precedent it sets. The Second Circuit's decision demonstrates that this Court should hold that the law provides minimum standards for testing the genuineness of such claims.[9]

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the cost of future or medical monitoring in a civil action could potentially devastate the court system as well as defendants. Again, this is not to say that defendants who have caused such exposure should not pay the price. Certainly, theoretically both justice and common sense dictate that they should, however, practically there must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiffs being remediless. Thus, to prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely. This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and will continue to be drawn, to limit and delineate the whens and ifs individuals will be allowed recovery for a wrong committed against them.
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> *Ball v. Joy Technologies,* 755 F. Supp. 1344, 1372 (S.D.W.Va. 1990).

[8] According to the Restatement (Second) of Torts, "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." RESTATEMENT (SECOND) TORTS 436A (1965) (emphasis added).

[9] For example, James F. Early, a partner in New Haven's Early, Ludwick & Sweeney which handles similar cases, recently stated, "what is significant about this case is that you may be able to bring a lawsuit at an earlier date, rather than waiting until you have some objective evidence in the form of an x-ray, a breathing test, before the actual physical manifestation." Steven Fromm, supra, note 1. The potential for future litigants to be able to bring a lawsuit without possessing any objective evidence of the claim is a frightening proposition for our judicial system.

A. THERE SHOULD BE A REQUIREMENT OF SOME PHYSICAL MANIFESTATION OF THE DISTRESS

The interests of justice require adoption of a bright-line rule establishing the standard for compensating mental injuries. The "genuineness" of the claim can best be addressed by the physical manifestation requirement.[10] Emotional distress without physical consequence is unlikely to be serious and, more probably, is "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants." RESTATEMENT (SECOND) OF TORTS, 436A cmt.b (1965). Moreover, emotional distress is easily imagined and feigned. The modern medical community has long accepted the correlation between mental illness and physical manifestations.[11] RESTATEMENT (SECOND) OF TORTS, 436A cmt.b (1965). Finally negligence is not so great a fault as to require the imposition of liability for purely mental injury. RESTATEMENT (SECOND) OF TORTS, 436A cmt.b (1965).

Undoubtedly, there will be cases where serious mental injury is not accompanied by physical harm, but these are in the minority. *Payton v. Abbott Labs.,* 386 Mass. 540, 555, 437 N.E.2d 171, 180 (1981). Allowing recovery simply because these cases exist is not rational or justifiable. *Id.* at 556, 180. Emotional distress without physical manifestation is not a reasonably foreseeable consequence of mere negligence. *Id.* Courts must refrain from burdening the judicial system and potential defendants with claims which are "trivial, evanescent, temporary, feigned, or imagined, in order to insure that occasional claims of a more serious nature receive judicial resolution." *Id.* To avoid imposing such a burden, courts should require that plaintiffs corroborate their mental distress claims with objective evidence. The best objective evidence is physical manifestation, supported by medical proof of causation.

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[10] The courts in many jurisdictions require emotional distress to be physically manifested in order to be compensable. See *Towns v. Anderson,* 195 Colo. 517 (1978) (en banc) (physical manifestations or mental illness); *Barnhill v. Davis,* 300 N.W.2d 104 (Iowa 1981) (bystander case); *Vicnire v. Ford Motor Co.,* 401 A.2d 148, 155 (Me. 1979) (illness or bodily harm "substantial and manifested by objective symptemology"); *Vance v. Vance,* 388 Md. 490, 500 (1979) ("capable of objective determination"); *Corso v. Merrill,* 119 N.H. 647, 653 (1979) (bystander case) (physical symptoms . . . susceptible to some form of objective medical determination and proved through medical witnesses").

[11] Leslie Benton Sandor and Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss,* 37 ARIZ. L. REV. 1247, 1254 (citing Nancy Levit, *Etherial Torts,* 61 GEO. WASH. L. REV. 136, 184-88 (1995), (citing studies to support the proposition that psychological stress induces physical changes, an plays a role in the onset of disease)).

B. THE PLAINTIFF'S EMOTIONAL DISTRESS MUST BE SEVERE

Even courts adopting the most liberal approaches which do not require physical manifestation of the emotional injury have maintained the requirement that the plaintiff's distress be severe. *See, e.g., Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996). For example, the Tennessee Supreme Court found that "in order to guard against trivial or fraudulent actions, the law ought to provide the recovery only for 'serious' or 'severe' emotional injury." Id. (following *Burgess v. Superior Court*, 2 Cal. 4th 1064, 831 P.2d 1197, 1200 (1991); *St. Elizabeth Hosp. v. Gerrard,* 730 S.W.2d 649, 653 (Tx. 1987)). A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Rodrigues v. State,* 472 P.2d 509, 520 (Haw. 1960); *Paugh v. Hanks,* 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (Ohio 1983); *Plaisance v. Texaco,* Inc., 937 F.2d 1004, 1010 (5th Cir. 1991); PROSSER AND KEETON ON THE LAW OF TORTS, 54, at 364-65, n. 60.

In the case before the Court, the Plaintiff provided no objective evidence that he suffered severe emotional distress. *Buckley v. Metro-North Commuter Railroad,* 1995 WL 110380 (S.D.N.Y.). The district court properly noted that "[d]espite the emotional distress plaintiff claims, he continued working in the Grand Central Terminal even though it is undisputed that he could have transferred to any one of several asbestos-free facilities where both he and his father had previously worked." *Id.* at 3. The district court also pointed out that "even after being warned by a doctor and viewing the videotape about smoking, plaintiff continued to smoke cigarettes whenever I feel like having one.'" *Id.* These facts by no means demonstrate a person suffering from emotional distress severe enough to have a tort claim where there is no accompanying physical injury. The Second Circuit's decision allowing such a tenuous claim in this test case for 140 other plaintiffs should not be allowed to stand as precedent.

C. THE PLAINTIFF MUST PROVIDE MEDICAL PROOF OF THE DISTRESS

This Court should adhere to the traditional common law requirement that the plaintiff provide medical proof or scientific proof of the injury. The common law has steadfastly required medical or scientific proof that the

injury was caused by the event as well as the extent and permanency of the injury.[12] The requirement for medical proof not only provides causal connection, it also provides some objective measure of the genuineness and extent of the injury.

In addition, the requirement for medical evidence allows the defendant to test the validity of the plaintiff's complaint and helps the court ferret out nonmeritorious claims. *Paugh v. Hanks,* 451 N.E.2d 759, 767 (Ohio 1983) ("Expert medical testimony can assist the judicial process in determining whether the emotional injury is indeed serious.")

Even courts adopting the most liberal approaches have maintained the requirement that the claimed injury must be supported by expert medical or scientific proof. *See Camper v. Minor,* 915 S.W.2d 437, 446 (Tenn. 1996) ("Finally we conclude that the claimed injury must be supported by expert medical or scientific proof"); *Leong v. Takasaki,* 55 Haw. 398, 520 P.2d 758, 766-67 (Haw. 1974) ("the plaintiff should be permitted to prove medically the damages occasioned by his mental responses to defendant's negligent act"). As pointed out in Justice Ginsberg's dissent in *Gottshall,* "[o]ur solution to this problem - a solution the Court does not explore - would be to require such 'objective medical proof' and to exclude as too insubstantial 'injury' claims lacking this proof." *Gottshall,* 114 S.Ct. at 2418 (Ginsberg, J., dissenting).

In the present case, the Plaintiff offered no medical testimony or any testimony other than his own to support his alleged emotional distress claim. In fact, the medical proof is to the contrary. The medical proof by the physician who examined the plaintiff was that the plaintiff did not display the level of concern worth even considering the need for counseling. *Buckley v. Metro North Commuter Railroad,* 1995 WL 110380 (S.D.N.Y.)

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[12] For earlier courts, "harm" was "distress serious enough to require medical attention." *Negligence and the Infliction of Emotion Harm: A Reappraisal of the Nervous Shock Cases,* 35 U. OF CHICAGO L. REV. 512, 517 (1968) ("The medical attention in this minimum standard refers to any kind of aid, consultation, or prescription and not just psychiatric help. Admittedly, this standard is rather vague, but 'harm' is not a concept which can be defined with precision.")

CONCLUSION

Certain safeguards should be firmly established to protect against the "specter of unlimited and unpredictable liability" as this Court described the potential effect on American tort law in *Gottshall*. *Gottshall*, 114 S.Ct. at 2411. The Second Circuit's ruling, which allows a plaintiff to enter the courthouse doors with an alleged emotional distress claim without any physical manifestation or evidence of the severity of the claim or medical proof to support the claim, discards all of the important limitations placed by this Court on the class of plaintiffs that may recover for emotional injuries. *Id.* at 2405. Maintaining the requirements that the emotional injury be serious or severe and established by medical or scientific proof provides objective criteria permitting defendants to test the validity and extent of the injury for which they may be liable. It will also prevent a flood of potential claims based solely upon the plaintiff's subjective complaints.

Accordingly, *Amicus Curiae*, the Defense Research Institute, respectfully submits that the Petition for Certiorari should be granted and the decision of the Second Circuit reversed. The Court should take this opportunity to recognize established common law requirements imposed to place rational limits on recovery for negligent infliction of emotional distress and provide guidance to the lower courts.